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No. 84-1321

In The

Supreme Court of the United States

October Term, 1983

CRISPUS NIX, WARDEN OF
THE IOWA STATE PENITENTIARY,

Petitioner,

vs.

EMMANUEL CHARLES WHITESIDE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

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STATEMENT OF PREVIOUS FILINGS

The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix accompanying the Petition for A Writ of Certiorari.

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	*Proceedings*
August 16, 1977	Ruling on Supplemental Motion for New Trial and Order Settling Sentencing
December 20, 1978	Opinion and Judgment of the Supreme Court of the State of Iowa
December 7, 1982	Order of the United States District Court Denying Writ of Habeas Corpus
September 19, 1984	Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit
December 24, 1984	Order of the United States Court of Appeals for the Eighth Circuit denying rehearing en banc
November 13, 1984	Order Extending time for filing Petition for a Writ of Certiorari to February 16, 1985
February 15, 1984	Petition for Writ of Certiorari filed with United States Supreme Court
April 15, 1984	Order of United States Supreme Court granting petition for writ of certiorari

(p. 1) IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

CRF #3199-0277

STATE OF IOWA,

Plaintiff,

vs.

EMANUEL CHARLES R. WHITESIDE,

Defendant.

TRANSCRIPT OF SHORTHAND NOTES

Trial of the above-entitled case commenced May 9, 1977, in the Linn County Courthouse, Cedar Rapids, Iowa, before Judge Harold D. Vietor and a Jury.

Appearances:

Mr. Harold Denton
Assistant County Attorney
Linn County Courthouse
Cedar Rapids, Iowa

Mr. Glenn Johnson
Assistant County Attorney
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Cedar Rapids, Iowa For the Plaintiff.

Ms. Donna L. Paulsen
Attorney at Law
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Mr. Gary L. Robinson
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(p. 26) THE COURT: I understand this is essentially a self-defense case; is that right?

MR. ROBINSON: That's correct.

MS. PAULSEN: Yes.

THE COURT: The defendant will be asserting that whatever he did, he did in justifiable self-defense?

MR. ROBINSON: That is correct.

THE COURT: And it will be the burden of the State to prove otherwise and, of course, the right of the defendant to introduce any and all evidence that is relevant on the issue of self-defense.

MR. ROBINSON: That's correct.

• • •

(p. 53) JAMES R. STOUT,
called as a witness in behalf of the State, being duly sworn by the Court, testified as follows:

Direct Examination

BY MR. DENTON:

Q. Would you state your name and tell us in what city you reside?

A. James Raymond Stout; 36—or 37 36th, Kansas City, Missouri.

Q. Okay. Are you employed now in Kansas City?

A Yes, I am.

Q. And how long have you lived in Kansas City?

(p. 54) A. Since Friday.

Q. Now up until this past Friday were you living here in Cedar Rapids?

A. Yes, I was.

Q. Were you living in Cedar Rapids on February 7 and 8 of 1977?

A. Yes.

Q Could you tell us where you were living here in Cedar Rapids?

A. 839 4th Avenue, S.E.

Q. Okay. Now what kind of a building is that?

A. It's (sic) apartment complex.

Q. Okay. How many apartments are there in there, if you know?

A. Approximately ten.

Q. Was there an individual living there named Calvin Love?

A. Yes, there was.

Q. Did he live fairly close to your apartment?

A. Yes, he did.

Q. Okay. About how far away from your apartment did he live?

A. Approximately 15 feet and across the hall.

Q. Now was this a second or third floor apartment or what?

A. Second floor.

Q. Do you know if anyone was residing with Mr. Love?

A. Yes, there was.

Q. And who was it?

A. A girl by the name of Kathy Sauer.

Q. Were you acquainted with both Mr. Love and Miss Sauer?

(p. 55) A. Yes, I was.

Q. Would you say that you were a friend of both of them?

A. Yes.

Q. Did you see Mr. Love on February 7 of this year?

A. Yes, I did.

Q. Okay. About what time would you have seen Mr. Love?

A. Around 4:30, 5 o'clock in the evening.

• • •

(p. 56) Q. Now did you—could you tell us if you heard anything about two o'clock in the morning?

A. Yes, I did. I heard what appeared to be two to three pairs of footsteps coming up the stairs, at a fairly normal pace. They were loud. Heard the people go to Calvin's apartment and knock on the door. I heard Calvin holler, "Who is it?" But I did not hear a reply. And I guess after that he did let them in.

Q. Okay. Why don't you just tell us what you heard.

(p. 57) A. Okay. After I heard the door open—as he had a knife stuck in the door to keep it locked—after I heard the door open or closed and that was all I heard for approximately ten minutes or so. After that I heard some scuffling and some yelling in the apartment. I couldn't really make out what it was. But just a couple minutes after that I heard the door open and people running down the stairs.

Q. Okay. Now when you say—you say you heard people running down the stairs?

A. Right.

Q. This would have been shortly after two o'clocck?

A. Right. I heard a scream also before they ran.

Q. Okay. Now what happened after you heard the scream and the people running?

A. Kathy came over to my door and knocked on the door, and she was yelling something about Calvin had been hurt or stabbed, or something to that effect, and to come over. She sounded fairly loud and screaming, so I couldn't make out all of it. I told her I'd be over as soon as I got dressed, which I got dressed and I ran over there.

Q. Okay. Did she appear to you to be—was she hysterical or—

MR. ROBINSON: Objection. Calls for an opinion, conclusion of the witness. No foundation as to competency.

THE COURT: Overruled.

A. She was not hysterical. She was close to hysterical. She (p. 58) was running around and screaming at

the time. But I came over. I walked in the apartment and seen what had happened.

* * *

MR. DENTON: No further questions.

(p. 59) *Cross-Examination*

BY MR. ROBINSON:

(p. 60) Q. Mr. Stout, this apartment complex you've referred to is really an old house, isn't it?

A. Yes, it is.

* * *

(p. 66) Q. About what time did you arrive back at 839 Fourth Avenue, S.E.?

A. It was approximately 6:15, 6:30 in the morning, after we had left the police station.

Q. Was the Love apartment open or closed at that time?

A. It was closed.

Q. Was it padlocked?

A. Yes, it was.

Q. Did you subsequently break that padlock off?

A. The lock was broke the next morning—the next day at approximately noon. They came over, the family came over to collect Calvin's things. Kathy did not have the key with her, and she did not know where it was. This was Calvin's chain, hasp and lock, and the family

asked me to remove it from the (p. 67) door with the tools I had.

Q. So, in other words, you did break in the lock

A. I did break the lock with their permission.

Q. And Kathy Sauer wanted to get into the apartment and told you to break the lock, it was all right, and she'd go in?

A. Right.

Q. And her and the rest of the Love family then moved everything out; isn't that a fact?

A. Correct.

Q. Isn't it a fact they took carpeting off the floor and chains off the walls, right down to the bare wall?

A. They took any possession of Calvin's.

Q. About how long did this take?

A. Approximately an hour.

• • •

(p. 71) KATHY SAUER,

called as a witness in behalf of the State, being duly sworn by the Court, testified as follows:

Direct Examination

BY MR. DENTON:

Q. Would you state your name and tell us in what city you reside?

A. My name is Kathy Sauer. I live in Cedar Rapids.

Q. Now when you're answering questions will you please speak up (p. 72) as all these people here at the end have to hear you. Okay?

A. (Nod in the affirmative.)

Q. Were you residing at Cedar Rapids on February 7 and 8 of 1977?

A. Yes.

Q. Okay. Could you tell me where you were residing on those dates?

A. 839 Fourth Avenue, S.E.—

Q. Were you residing with somebody at that time?

A. Yes.

Q. Okay. And who was that?

A. Calvin Love.

Q. And how long had you been residing with Mr. Love?

A. Almost two months.

* * *

(p. 76) Q. Now can you tell us what happened about two o'clock that morning, February 8?

A. Someone knocked at the door. It was a quarter after two. And it woke Calvin up, and Calvin asked who it was. And he said, "Doolin." And Calvin said, "Who?" And he said, "Doolin." He said, let him in. So I walked to the door, and I asked again who it was. And they said, "Doolin." So I opened the door. And I seen Doolin and

this white boy. I didn't know who the—who he was, you know. And then I turned around (p. 77) and they followed me in and White—Charles walked in after him.

Q. Okay. What happened after these three men entered the room? Where did you go after they entered the room?

A. Set on the bed.

Q. Now you indicated that one of these—one of these men was named Doolin?

A. (Nod in the affirmative.)

Q. Did you know him?

A. I've seen him.

Q. Okay. Where did he go once he entered the room?

A. He went to this—they all walked in on the side, and then Charles walked around to the side of bed Calvin was laying on. Then Doolin was standing at the foot of the bed, and Terry Fowler was standing over by the chair.

Q. Okay. Now Terry Fowler, is he the white person you referred to?

A. Um-humm. Yes.

Q. Okay. Now after these three people entered the room, can you tell me what happened then?

A. Charles asked for the reefer again and Calvin, he said that he didn't pay for it. They just argued again over it.

Q. Do you remember what was said between them back and forth?

A. Charles said he wanted the reefer. Calvin said, "Man, I thought we settled this." And he said, "No, I want my half." (p. 78) Calvin said, "Come back tomorrow and we'll settle it. Just leave."

Q. Okay. Did Charles leave?

A. No.

Q. Okay. What happened after they argued about it and that was said?

A. And then Charles, he put—he had his hand in his back pocket.

Q. Okay. Did Calvin say anything to him?

A. Yes.

Q. Okay. What did Calvin say to him?

A. He said, "Man, you better get your hand away from your shit."

Q. And what did Charles do? What did Charles say after that was said?

A. He said—he—the whole thing Calvin said was, "Man, you better get your hand away from your shit or I'm going to have Kathy get my shit from under the bed."

Q. Okay. What happened after that was said?

A. Calvin looked at me and winked.

Q. Okay. What did Charles do after that?

A. He said—Charles said, "If Kathy reaches for anything, she'd be dead before she gets to it."

Q. Okay. What happened after that was said?

A. Calvin went to get up off the bed.

Q. Okay. Did Calvin say anything to Terry Fowler?

(p. 79) A. Yes.

Q. Okay. And what was that?

A. Terry was taking off his coat, and Calvin said, "Man, what do you think you're doing?" And that was—

Q. What did Terry do once Calvin said that?

A. Put back on his coat.

Q. Okay. What did Calvin do after he saw Terry and told him that?

A. What did he do?

Q. What did Calvin do after he said that to Terry? What did Calvin do?

A. Calvin—what did Calvin do?

Q. What did Calvin do?

A. After he said that to Terr—

Q. After he spoke to Terry, what did Calvin do? Did he try to get up off the bed or what, after he saw Terry?

A. That was before. That was before Charles said anything to Calvin.

Q. That was first?

A. Right. That was first. That came before that.

Q. Okay. Now after this—after this now you said that Calvin started to get up; is that right?

A. Um-humm. Yes.

Q. Okay. Can you tell me then exactly what happened then?

A. Calvin went to get up out of the bed, and when he went to (p. 80) move, Charles grabbed him and stabbed him. And it was fast. It was real fast.

Q. Okay. Now were you off to the side of the bed; is that right?

A. Yes.

Q. From where you were, did you actually—did you actually see a knife or anything?

A. No.

Q. Okay. Can you tell us then, relate to us exactly what you saw happen after Charles grabbed Calvin.

A. I just seen motions.

Q. Okay. Can you tell us, if you remember, what motions you saw?

A. It was just like this. (Indicating.) It was just real quick. And it was—that was it. You know—do you understand what I mean?

Q. I want to make sure that the jury understands what you mean. Because, you know, you've got to kind of explain it to them. Because they're the ones that have to—that have to hear the testimony. So if you kind of explain it to them exactly what happened.

A. He took his hand out of his back pocket and stabbed him. It was just—it was like that. (Indicating.) And it was real fast. And Calvin fell.

Q. Okay. Was Calvin still in the bed?

A. He fell onto the bed.

Q. Okay. Had he actually managed to stand up when he was stabbed?

(p. 81) A. After he fell on the bed, he stood up once and then fell on the bed again.

Q. Okay. Did Calvin say anything after he was stabbed?

A. He didn't say nothing to nobody after—he said something to me before I called the ambulance.

Q. Now can you tell us then after Calvin was stabbed, exactly what happened after that?

A. I went to go over towards Calvin and then Charles started walking towards me, and he wanted the reefer. He said, "Where's it at?" And I grabbed it and I put it in his hand, and I said, "Here it is." I said, "Get out of here."

• • •

(p. 83) MR. DENTON: No further questions.

Cross-Examination

BY MR. ROBINSON:

• • •

(p. 95) Q. During the course of the time between 2:15 until the time Mr. Whiteside and the others left, did Calvin ever get completely off the bed and go towards the kitchen and turn off a light or something and get back on the bed?

A. Calvin got up once, and he did not go toward the kitchen. I don't—he didn't go towards the kitchen, I don't think.

Q. But he got completely out of bed on one occasion?

A. Yes.

Q. Did Calvin get up and completely leave the bed before or after he made the reference to you getting his shit from under the bed?

A. Before.

Q. And then he went back to the bed and sat down and laid down?

A. Yes.

Q. When he told you to get his shit from under the bed, what did that mean to you?

A. I didn't know what it was supposed to mean.

Q. You're sure it didn't mean a weapon?

A. We didn't have no weapons.

(p. 96) Q. And you never considered the term "shit" to mean a weapon?

A. That's what it meant. But when Calvin said that, I didn't know what—you know, I didn't understand him, because I figured we didn't have anything; that's why he winked at me.

Q. Are you sure he didn't say, "Katie, get me my weapon"?

A. He didn't call me Katie.

Q. I'm going to refer you again to your grand jury testimony, March 9, 1977. This is the people in the room with Mr. Denton. Do you recall the time I'm talking about?

A. Yes.

Q. Question. From Mr. Denton. "Okay. And then what happened when you realized that Whiteside was with them? What did you do?" Your answer goes on for about 19 lines on the one page, goes over, "Calvin says, 'Get your hand away from your shit,' and, 'Katie, get me my weapon.'"

A. That isn't what I said.

Q. Are you positive you didn't say that? Isn't it a fact that that's what you did say? (Handing witness transcript.)

A. That doesn't say Katie. That says Kathie.

Q. I'm sorry. You're right. That says "Kathie," with an i-e.

A. I sometimes spell my name Kathie, with an i-e.

Q. I see. Well, then did you testify on a prior occasion that Calvin said, "Kathy, get me my weapon"?

A. That Calvin said that?

Q. Yes.

(p. 97) A. Yes. But he did not use the word "weapon."

Q. So your testimony in front of the grand jury was incorrect?

• • •

(p. 98) A. It wasn't incorrect. It was—when I was talking to the people, instead of swearing, which I'm trying to cut down on, I used "weapon" in place of "shit."

Q. But they mean the same thing?

A. Yes.

Q. And you knew they meant the same thing on February 8 of 1977?

A. Yes.

Q. Kathy, you've also said that Calvin got out of the bed and then got back on. That was your testimony, I believe, today. Is that testimony correct?

A. Yes.

Q. And do you recall when we took your deposition —do you recall when we took your deposition, when I asked you some questions about a month ago? Do you recall that?

(p. 99) A. Yes.

Q. And I believe Mr. Denton was there and Mr. Johnson was there. Do you remember that?

A. Yes.

Q. And do you recall me asking you, referring to Calvin, "He doesn't get up at all; he just lays there?" And your response being, "Yeah." Do you recall that?

A. If that's what it says in—that's what I said.

Q. Okay. You said that at the deposition, and you said that Calvin got out of bed completely today. Which version is correct—

A. He got out of bed.

Q. —as you recall? You also indicated in the deposition that the whole thing took about three minutes, three or four minutes. Is that correct?

A. Three, four, five. Given five-minute span.

Q. It wasn't very long?

A. It wasn't really that long.

Q. And it's your position they arrived at 2:15, so they would have had to have left around 2:20?

A. 2:20, yeah. Around there.

Q. You would say they left at least by 2:20 in the morning?

A. Yes.

Q. Could they have left any earlier than that?

A. No.

(p. 100) Q. You had not seen a weapon in Mr. Whiteside's hand for any period of time prior to the actual incident itself, did you?

A. No.

Q. In other words, he didn't come into the apartment brandishing a knife or didn't stand in the apartment for those three or four minutes with that knife out, did he?

A. No.

Q. And the knife was only drawn—the stabbing took place and it was over, I believe you said, "so fast"?

A. Yes.

Q. Would you say it happened (snaps fingers) like that?

A. Yes.

Q. And it happened after Calvin made the reference to you to get your shit or to get his shit, which you translated into getting a weapon?

A. Yes.

* * *

(p. 101) Q. Did you go back to 839 Fourth Avenue, S.E., on February 8 after you left the hospital?

(p. 102) A. During the daytime.

Q. Do you recall what time you arrived there?

A. Oh, I really don't remember that. There was two detectives that come up there though.

Q. Was that before or after you entered into the apartment?

A. After.

Q. When you arrived back at 839 Fourth Avenue, was the apartment open or closed?

A. It was closed.

Q. And did you have a key?

A. I had a key, but the police took the key, so when —if when they locked it up, if they wanted to go back in or something like that. And I never did get my key back.

Q. So the police had sealed the apartment?

A. Yes.

Q. And you authorized them—you told Mr. Stout to force the lock and because you wanted to go back in the apartment?

A. To get some things. Yes, some clothes.

Q. And isn't it a fact that the same day everything was moved out of the apartment?

A. Yes.

Q. Including carpeting off the floor?

A. Yes.

Q. Kathy, Mr. Stout indicated that you had a butter knife in the door; is that correct?

(p. 103) A. Yes.

Q. Now that butter knife was there just for security purposes, to keep the door locked?

A. To keep the door locked.

Q. And you didn't consider that butter knife a weapon, did you?

A. No.

Q. When Calvin made the comment to you about the weapon, about getting his weapon or his shit, where was he at that time?

A. On the bed.

Q. Was this after he had gotten up and walked around, or whatever, and gone back to the bed?

A. Yes.

Q. And was he sitting on the bed at this time?

A. He was kind'a propped up a little bit.

Q. So he wasn't laying down?

A. He was laying at an angle.

Q. And then he subsequently moved toward Mr. Whiteside after he made the comment about getting his shit or his weapon?

A. After Mr. Whiteside made the comment of, "If she reaches for it, she'll be dead before she gets to it."

Q. But he did move toward Mr. Whiteside?

A. Yes.

Q. Were you in a position to observe his hands at this particular time? Were you paying any particular attention to him?

A. Whose hands?

(p. 104) Q. Calvin's.

A. I could see his hands.

Q. Where were they?

A. They were like this, when you're getting up. (Indicating.) Just like when you're getting up, where your hands normally are.

Q. Did he ever turn toward the pillows that were on the bed?

A. I don't recall.

• • •

(p. 170) JAMES KINKEAD,

called as a witness in behalf of the State, being duly sworn by the Court, testified as follows:

Direct Examination

BY MR. DENTON:

Q. Would you state your name and tell us how you're employed?

A. James Kinkead. I'm a patrolman for the Cedar Rapids Police Department.

• • •

(p. 173) Q. What did you do after—after you left the hospital?

A. We got the keys to the apartment from—I believe her name was Kathy Sauer.

Q. When you say "we," who's we?

A. Identification Officer White and myself.

Q. Okay. What did you and Officer White do?

A. We went back up to the apartment, and he took measurements of the apartment and pictures, and we looked around for any—anything that might be of evidentiary value, and we found none.

Q. Okay. Did you find any weapons or anything like that?

A. No, we didn't.

Q. Did you assist Officer White then in examining the apartment?

A. Yes.

Q. How would you describe that apartment?

A. Well, it was small, very untidy. Things were—I got the impression that they had just moved there. Things were still stored in boxes. It was very unkempt.

Q. Did you do anything other than assisting Officer White? Did you do anything after that?

A. I just went in the station, made my report.

Q. Okay. And that was the extent of your involvement in the case?

A. Yes.

• • •

(p. 175) Q. When you arrived at 3 o'clock, was the apartment open or closed?

A. It was locked by chain and padlock.

Q. And you had received—this is the key then you had received from Kathy Sauer?

A. Right.

Q. When you conducted your search, did you check the chest of drawers? Did you open the drawers to see what was inside the drawers, for a weapon?

A. I believe some of them were open. I didn't personally look in those drawers. Off—

Q. I'm sorry, I didn't let you finish.

A. Officer White may have; I don't know.

Q. But you personally did not?

A. No, I don't believe so.

Q. Did you check in the closet?

A. I can't even remember where the closet was.

Q. Did you check in the kitchen or any of the cupboards of the kitchen?

A. Yes. I looked in the kitchen and the bathroom.

Q. And the area around the bed?

A. Yes.

Q. And isn't it a fact at that time you were looking for a knife?

A. We were looking for a knife or anything that might be of evidence.

(p. 176) Q. And this took you approximately 15 minutes?

A. Fifteen or 20 minutes.

Q. When you left, what did you do to the apartment?

A. We locked it back up.

• • •

(p. 190) RICHARD WHITE,

called as a witness in behalf of the State, being duly sworn by the Court, testified as follows:

Direct Examination

BY MR. DENTON:

Q. Would you state your name and tell us in what city you reside?

A. Richard White. Cedar Rapids, Iowa.

Q. And could you tell me how you are employed?

(p. 191) A. I'm an Identification Officer, Cedar Rapids, Iowa, Police Department.

• • •

(p. 192) Q. Okay. What did you do after the body had been removed?

A. I went directly to the apartment. I photographed the scene, made a cursory search for a possible weapon, talked to the officers on the scene in regards to what they had done at that point. I simply made a search of the room. As soon as we were satisfied that there was no weapon, I left the scene, proceeded to the hospital to determine the extent of injuries (p. 193) of the victim.

Q. Okay. What did you do after you left the scene?

A. I went directly to the hospital, the emergency room. I stood by there while the emergency room treated the victim. I stayed there until the victim was pronounced dead, approximately 2:42.

Q. Okay. What did you do after the victim was pronounced dead?

A. I talked to the officers at the hospital. Sergeant Hintz was on the scene. I advised him that I would need someone to go back to the scene with me to further investigate the scene in regard to dimensions of the room, make

a further search for anything that might be evidence in regards to the case.

Q. Okay. Who went with you?

A. Officer Kinkead.

Q. Okay. And what time did you return to 839 Fourth Avenue, S.E.?

A. I don't recall the exact time. We had been gone approximately 30 to 45 minutes from the time of my first arrival.

Q. And what did you do when you returned to the scene?

A. Upon returning to the scene, I went directly to the apartment, went inside, made a further search, again in mind looking for a weapon. It had been indicated to us that there might possibly be drugs involved. We made observations of things laying around the apartment, keeping in mind the weapon and any possible drugs or paraphernalia. Made a complete search (p. 194) of the apartment in regards to the rooms immediately adjacent to the scene. Went ahead and made measurements of the perimeters of the room. That was about the extent of it.

Q. Okay. Did you locate any weapons?

A. No, we didn't.

• • •

(p. 197) Q. When you left the—when you left the apartment the first time and went to the hospital, did you make any effort to secure the apartment?

A. Yes, we did. I had security key from Kathy Sauer who was at the apartment when I arrived. This key was to a padlock which was used to secure the door along with a piece of chain which went through the door and the door frame. We put this chain through the appropriate hole in the door and put the padlock on the chain, securing it.

Q. Okay. And when you returned, was that padlock still on the door?

A. Yes, it was.

Q. And then you processed the scene; is that right?

A. Yes.

Q. Was there any other entrance to the apartment, if you can (p. 198) recall?

A. There was another door entering the apartment from the bathroom. However, this was secured. I don't recall exactly how—it was either nailed—we attempted to open this door, and it was secured in such a way that we couldn't force it open.

* * *

(p. 201) *Cross-Examination*

BY MR. ROBINSON:

Q. Officer, when you arrived at 839 Fourth Avenue, S.E., what condition was the apartment in?

A. Well, as I stated, when I entered the apartment the officer had secured the scene. I found the furniture

in the indicated approximate positions—the couch on top of the (p. 202) chair. The bed was in disarray. The bedding pulled back. The chalk mark on the floor indicating the position of the victim as the ambulance crew had found him. Nothing really other than that was made note of at the time.

Q. Did you yourself seal the scene of the crime then when you left the first time?

A. Yes, I did. I placed a padlock on the chain which secured the only entrance to the apartment.

Q. And at that point in time there was no one else in the apartment itself?

A. No, there wasn't.

Q. And did you advise Miss Sauer that you were sealing the apartment?

A. Before she left the apartment we advised her that we would be securing the apartment. We asked her for the key, which she turned over to us. We told her that it would remain secured until we felt that it could be released.

Q. And you notified her that until you had released the scene then that that apartment was to remain secure?

A. Yes, I did.

Q. Is it important to secure the scene of a crime?

A. Very important, yes.

Q. Why is that?

A. For the preservation of any possible evidence.

Q. And to keep people from possibly removing items of evidence?

(p. 203) A. Yes.

Q. When you returned the second time to the apartment, it was still secure?

A. Yes, it was.

Q. And you used the key to obtain entry—the key to the padlock?

A. Yes.

Q. And you conducted then another search at that time?

A. Yes.

Q. Did you search the drawers of the chest, the drawers that is referred to on your diagram?

A. One of the drawers was standing open. I observed that there were items of clothing in this drawer. That's the extent of any search of that particular area.

Q. You did not search the other drawers of that particular chest of drawers then?

A. No, I didn't.

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(p. 227) TERRY FOWLER,

called as a witness in behalf of the State, being duly sworn by the Court, testified as follows:

Direct Examination

BY MR. DENTON:

Q. Would you state your name and tell us in what city you reside?

A. Terry Jim Fowler; Newhall, Iowa.

Q. Okay. Now, Mr. Fowler, were you in Cedar Rapids on the night of February 7 and the morning of February 8, 1977?

A. Yes.

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(p. 229) Q. Did you and the other two people discuss doing anything at two o'clock?

A. Yeah. "Let's go score some marijuana."

Q. Do you remember who said that?

A. Either Doolin or Whiteside. I don't remember.

Q. Okay. One or the other of them said that?

A. Yeah.

Q. Okay. And did you go anywhere then?

A. Yeah. We started walking. I didn't know where I was going. More or less a tag-along.

Q. Okay. Were you following those other two?

(p. 230) A. Yes.

Q. Okay. Did you go to—did you go to an apartment building near the 420 Club?

A. It was about—yeah, about four blocks from there.

Q. Okay. Would that have been on Fourth Avenue, Southeast?

A. Yes.

Q. Okay. Do you recall what you did when you got to the apartment there?

A. Went on up. Went on up the steps and knocked on the door.

Q. Okay. Do you recall who it was that knocked on the door?

A. Doolin.

Q. Now do you recall what was said after Doolin knocked on the door?

A. "Who is it?" And Doolin said, "Doolin."

Q. And what happened after that was said?

A. We—somebody came, the girl came and opened the door for us, and we came on in.

Q. Okay. Now would that have been Kathy Sauer that let you in?

A. Yeah.

Q. Okay. What did you do after you entered the apartment?

A. I went down, I went, sat on the couch. And Charles and Doolin went over to side of bed Calvin was on (sic).

Q. Okay. Now you refer to Calvin. Now who are you talking about?

A. The guy that was laying on the bed.

Q. Okay. There was somebody laying on the bed?

(p. 231) A. Yeah.

Q. Okay. Did you later learn that was Calvin Love?

A. Yeah.

Q. Okay. Now what did Doolin and Whiteside do when they went to the bed?

A. They wanted the marijuana or the money back.

Q. Okay. Now what happened after they asked for the money or the marijuana back?

A. He said, "Look under the bed."

Q. Okay. What happened after that?

A. Oh, they started arguing.

Q. And after they argued, what happened?

A. What?

Q. What happened after they argued?

A. I stood up. I got up to stand up and Calvin noticed me and started yelling, "Get out." And he got up and Charles stabbed him.

Q. Okay. What happened after Calvin was stabbed?

A. We were started—we were going to start going. We were going to leave. And the chick said, "Here, you have the reefer." We took the marijuana and we ran.

Q. Okay. The three of you left?

A. Yeah.

• • •

(p. 234) *Cross-Examination*

BY MR. ROBINSON:

Q. Terry, as a result of this incident you were arrested and charged, were you not?

A. Yes.

Q. And at a later proceeding you were given immunity by Mr. Denton and the State of Iowa to give testimony; isn't that a fact?

A. Yes.

Q. And all the charges were dropped against you if you testified for the State of Iowa; isn't that a fact?

A. Yes. But can I ask a question?

THE COURT: No.

Q. I prefer to ask the questions.

THE COURT: No, you just answer the questions—

* * *

(p. 237) Q. When you went into the apartment, was that apartment, was it real—was it as light as it is in here today?

A. No.

Q. As a matter of fact, it was pretty dark in there, wasn't it?

A. Yes.

Q. And it was pretty confined space in terms of where you could move, wasn't it?

A. Yes.

Q. And the couch that you were sitting on was pretty close to the bed and you had to squeeze between the couch and the bed, didn't you?

A. No.

Q. You could walk between it?

A. Yeah.

Q. Okay. Mr. Love was on the bed, was he not?

(p. 238) A. Yes.

Q. Was he lying on his stomach?

A. Yes.

Q. And Mr. Doolin went and sat on the bed next to Mr. Love, did he not?

A. Yes.

Q. And Mr. Whiteside remained standing as you were facing the bed, to the left of the bed; am I correct?

A. Left of Doolin.

Q. Okay. So Doolin was on the bed. So he was to the left even of Doolin?

A. No, he was about a foot back, by the wall.

Q. And the argument was about marijuana or getting money back?

A. Yes.

Q. And wasn't the argument about who owned the marijuana?

A. Could have been. I don't know.

Q. And Mr. Doolin and Mr. Whiteside were asserting that they owned the marijuana or at least half of the marijuana and Mr. Love was saying, "No, you don't"?

A. Yes.

Q. Do you recall, isn't it a fact, that at one time during the argument, very close to when the stabbing took place, and Mr. Love said he was going to get his gun out or get his piece out?

A. Yes.

(p. 239) Q. And in street terminology, what does "get your piece out" mean?

A. Gun, pistol.

Q. So when he said that, you thought he had a gun or a pistol?

A. Yeah.

Q. And after he said that, he then moved in the direction of Mr. Whiteside?

A. No.

Q. Did he move towards you?

A. He just started getting up.

Q. And isn't it a fact that he had told you to get out?

A. Yes.

Q. And had said, "White boy, don't take your jacket off in my house; get out of here"?

A. Could have. I don't remember.

Q. Or words to that effect?

A. Yeah.

Q. And so it was—the incident itself occurred when he was getting off the bed?

A. Yes, getting up on his knees.

Q. And it was after he had the reference to getting his piece out that this happened?

A. About—about five minutes—yeah.

Q. And while this is all—this is all happening at a very dark room that was difficult to see anything in; isn't that (p. 240) correct?

A. Yeah, but by that time my eyes were—I could still make out what, you know, what was going on.

Q. The room was dark?

A. Yeah, but it had a black light that gives off a little light.

Q. Is a black light the light that if you have like a white shirt on it makes it stand out?

A. Yeah.

Q. Now after you were arrested, you were taken to the police station and interviewed by Detective Millsap and Detective Ammeter, were you not?

A. Yes.

Q. And isn't it a fact that Detective Millsap and Detective Ammeter gave you a plastic bag similar to this and asked you if that plastic bag was the marijuana that you had seen?

A. No. They didn't say plastic bag. They said, "Is that the marijuana?"

Q. Okay. But they did show you some marijuana?

A. Yeah.

Q. And they asked you if that had been the marijuana that had been at Calvin's?

A. Yeah.

Q. Now it's a fact, is it not, that during the whole time that you were in Calvin Love's apartment, Charles Whiteside never once told Kathy Sauer that he was going to kill her, did he?

(p. 241) A. No.

Q. He never said that to her, did he?

A. Huh-huh.

Q. And even though you couldn't see well, there's no doubt you never heard that, did you?

A. Right.

Q. And it was she who suggested and she came to Mr. Whiteside and said, "Here, take the marijuana."

A. Yes.

MR. DENTON: I'm going to objecct to this form of questioning because I think it's permissible to lead a witness on cross-examination, but I think this has ceased to be leading and it's become testimony.

THE COURT: Overruled.

Q. I believe you answered "yes"?

A. Yes.

MR. ROBINSON: I have no further questions.

THE COURT: Any redirect?

Redirect Examination

BY MR. DENTON:

Q. Mr. Fowler, did you ever see Calvin attempt to reach under a pillow or anything for a gun?

A. No.

Q. Did Calvin have anything in his hands when he started to get up?

(p. 242) A. No.

Q. What did Calvin do after he was stabbed?

A. Fell right back to the bed.

Q. Do you remember Kathy Joy screaming at that time?

A. I think so.

Q. Okay. After—after she screamed, that was when she gave Charley the marijuana; is that right?

A. Yeah.

Q. Okay. Do you remember where she got the marijuana from?

A. Out of a dresser on the wall, built into the wall.

* * *

(p. 262) DERRICK E. DOOLIN,

called as a witness in behalf of the defendant, being duly sworn by the Court, testified as follows:

Direct Examination

BY MR. ROBINSON:

Q. Could you state your full name for the record and spell your last name please.

A. Derrick Eugene Doolin. D-o-o-l-i-n.

* * *

(p. 270) Q. Do you know about what time you arrived at Calvin Love's?

A. A little bit after two. I don't know what time exactly.

Q. Would it—you didn't—you just walked to Mr. Love's?

A. Yeah.

Q. What did you do when you arrived at Calvin Love's?

A. Went up and knocked on the door, I guess. Let us in.

Q. Who let you in?

A. That girl, Kathy girl.

Q. And where did you go in the room?

A. Around there by the bed and sat down.

Q. Did you sit down on the bed?

A. Yes.

Q. Where did Mr. Fowler go?

A. Sat down on the couch.

Q. Where did Charles go?

A. Around on the side of the bed.

Q. Was Charles on the same side of the bed you were on?

(p. 271) A. Yes.

Q. Did you have anything to say to Calvin?

A. Did I? Yeah. I asked him to turn me onto some reefer.

Q. And what was his response to that?

A. He said he didn't have any.

Q. What happened after he said that?

A. Charles said that, "Yes, he does. That's my reefer." He said he wanted a reefer.

Q. Okay. Charles said he wanted his reefer, referring to reefer that belonged to Charles?

A. Right.

Q. Who else was present besides Calvin?

A. That girl and Fowler and me.

Q. And Charles?

A. And C arles.

Q. And as far as you knew, the girl was there with Calvin?

A. Right.

Q. Was Calvin in bed?

A. Yes.

Q. Was he on his back or on his stomach?

A. On his back.

Q. Was he on his back the whole time?

A. Yes.

Q. And were you closer to Calvin than Mr. Fowler was?

A. Yes, I was.

(p. 272) Q. Were you closer to Calvin than Charley was?

A. Yes.

Q. Did the conversation between yourself and Charles and Calvin develop into an argument?

A. No, not really.

Q. What happened?

A. Well, when he said that he didn't have no reefer, Charles told him that he had his, and Calvin, he says something about—you know, acted like he didn't know what he was talking about. Told him he didn't have no reefer. And then he got up. Calvin was raising up or something because Fowler was taking off his coat. And he told the boy, he says—he says, "White boy, what you doing? Don't be taking your coat off in my house." Something like that. And—

Q. What happened after that?

A. After that, then he just—he got to talking to Charles. He got saying something to Charles. He kind'a knelt down, kind of bending over and stuff, acting like

he was getting some gun, getting a gun. Then he kind of just—he kind of just turned around and kind of jumped towards Charles, kind of, kind'a over me, towards Charles.

Q. Had Calvin said anything about a gun?

A. Yes. He told his girl to get him a piece, to get his piece.

Q. What if somebody says that, what does that mean to you?

A. A gun.

(p. 273) Q. Did you think Calvin had a gun?

A. I don't know. I didn't know what he had until he did that. You know, until he got doing that. Because he said that at least about two or three times. First he said, "Baby, get me my piece." That's as soon as Charles said he wanted the reefer.

Q. And it's your testimony that Calvin jumped Charles?

A. Um-humm.

Q. What happened when Calvin jumped Charles?

MR. DENTON: I'm going to object to this. I don't think that's exactly what the testimony was, and it's a leading testimonial question.

THE COURT: Overruled.

A. What happened?

Q. Yes.

A. It looked like they just got to fighting and stuff. You know, like they was hitting each other and stuff. Then

all of a sudden Calvin just turned around and lay back down, pulled the covers up over by his shoulders and stuff.

Q. During this fight between Calvin and Charles, did you see a weapon of any kind in Charles' hand?

A. No, I didn't see nothing.

Q. Was it—would you say it was dark in that room?

A. Yes.

Q. The visibility wasn't very good?

(p. 274) A. No, it wasn't.

Q. When you went to Calvin's, did you have in mind any plan to rob him?

A. No, I didn't.

Q. Had that ever been discussed?

A. No.

Q. Never been discussed, going up there and hurting Calvin or doing anything to him?

A. No.

Q. Did the fight between Calvin and Charles take place before or after Calvin said something about, "Baby, get me my piece," and jumped at Charles?

A. That happened afterwards, you know. First he was laying down. Soon as Charles said he wanted a reefer, something like that, he said, "Baby, get me my piece." He got to shaking his head. Then Fowler got to take off his coat and stuff, he got up. He said, "Don't be taking your coat off in my house," or something. Then Charles

said something. He got—he acted like he was bending down, reaching up under the pillow for a gun or something. He kind of turned, jumped, raised up a little bit. I thought he had a gun or something.

Q. Now what happened after Calvin pulled the sheets back up, did you leave?

A. Yes. Charles said—I mean, Calvin says to go ahead and take it. And so that girl, she asked him what —you know, (p. 275) "What does Charles want?" He said he wanted his reefers. So she went over to the drawer and got it out of the drawer.

Q. And then you left?

A. Yup.

Q. Did you hear Charles at any time threaten to kill Kathy Sauer?

A. No, I haven't. That's the first time I ever heard of her name.

MR. ROBINSON: I don't believe I have anything further.

THE COURT: You may cross-examine.

Cross-Examination

BY MR. DENTON:

Q. Did you ever see either Charles or Calvin with a gun or a knife?

A. Talking about the whole time I known them?

Q. The whole time that you were there that night.

A. Oh, no. No.

Q. You never saw either one of them—

A. No.

Q. —with a gun or knife?

A. No.

Q. Now when they started to fight, as you indicated, they were actually hitting each other?

A. Um-humm.

Q. Would you describe how they were hitting at each other?

A. Looked like they were fighting like with their hands kind of like above their shoulders or something.

* * *

(p. 285) EMANUEL CHARLES R. WHITESIDE,

the defendant, called as a witness on his own behalf, being duly sworn by the Court, testified as follows:

Direct Examination

BY MR. ROBINSON:

Q. Charley, could you state your full name for the Court Reporter and spell your last name please.

A. Emanuel Charles Ray Whiteside. W-h-i-t-e-s-i-d-e.

* * *

(p. 300) Q. Now what did you do when you arrived at the apartment building itself?

A. When I arrived at Calvin's apartment, I was the first one at the door, so I opened the door and everybody went in, as naturally. And we went on up the steps.

This is a very small step, and we got to the door, to Calvin's apartment.

Q. Now you've heard Officer Kinkead testify that these are very narrow steps?

A. They are very narrow.

Q. Okay. What happened when you arrived at Calvin's door?

A. When we got to Calvin's apartment, it was—I think it was on the second floor. Derrick was in the front. Fowler was second, and I was third. Derrick knocked on the door, and there was a voice answered from the inside.

Q. Do you recall what the voice said?

A. The voice was, "Who is it?"

Q. What was the response to that?

A. And Derrick say, "This is Derrick."

Q. Was the door to the apartment opened?

A. No, sir. There it wasn't open.

Q. Was it later opened by someone?

(p. 301) A. Yes, it was.

Q. Who opened it?

A. Kathy Sauer.

Q. When she opened the door to the apartment, did you go inside?

A. Yes, we did.

Q. Where did Mr. Fowler go?

A. I think Fowler took a seat on the davenport.

Q. Where did Mr. Doolin go?

A. Doolin went over by the bed where Calvin was lying down, and he sit down on the bed.

Q. Where did you go?

A. I followed Derrick. I went over by the head of the bed, where Calvin's head was lying, and I was standing there while he was talking.

Q. Where did Kathy Sauer go, if you remember?

A. Calvin—excuse me. Kathy Sauer took a seat across the room, in a reclining chair.

Q. Was that room—was it dark in the room?

A. Very much dark.

Q. Were there any overhead lights on?

A. Not to my knowledge, there wasn't any lights on at all.

Q. Could there have been a couple small lights on, a red light or something?

A. I didn't see anything on.

Q. Well, how were you able to see in the room?

(p. 302) A. It was—we was getting some glare from the outside like, from the window, a street light or something to that effect.

Q. You were able to make out shapes and—

A. Definitely, yes.

Q. Can you relate to the Court and to the ladies and gentlemen of the jury what happened next?

A. While I was standing there, Derrick was talking to Calvin Love, and Derrick asked Calvin, he say, "Why don't you give me some of the marijuana back? We can smoke it here. Give me part of it, anything." It was getting into a conversation about the marijuana. So Calvin seemed to have got, you know, got angry or something about it. So I didn't want any conflict to start. I say, "Well, just give us part of it. We'll sit right here and smoke it." So at that time he seemed to get more frustrated, got angry, and he told his girl friend, who was sitting across the room, he said, "Give me my piece," and I took that very close; it scared me. And I kind of stepped back, you know, and I thought for sure that he had a weapon.

Q. What happened after he said, "Get me my piece"?

A. When he said, "Give me my piece," Calvin stuck his hand under a pillow—

Q. What happened after that?

A. And at this time he just encountered me.

Q. What do you mean by "encountered"?

(p. 303) A. What do I mean by encounter?

Q. Yes.

A. I mean that he attacked me.

Q. He came off the bed at you?

A. That is correct.

Q. Were you still armed at this time?

A. Yes, sir, I was.

Q. And what happened?

A. When Calvin—when Calvin attacked me, I didn't see—there was no way for me to move. And Doolin was sitting on the bed like this. And I noticed—I just knew this man had a gun or something, and I couldn't get by, and he was already after me like this. So I kind of threw up my hand like this, and I kind'a pushed to get him back off me. The thing happened so fast. I actually—I don't know what happened. I can't recall anything of what happened.

Q. But you did stab him, didn't you?

A. Yes, I did cut him.

Q. And this took place after he made the reference to getting his piece?

A. That is correct.

Q. Did you think that Calvin had a gun?

A. Most definitely I thought that.

Q. Why did you think that?

A. Because of Calvin's reputation, his brother's reputation, (p. 304) because of the prior conversation that Calvin and I had, I didn't have no other choice but to think he had a gun. And when he told his girl friend to give him his piece, I couldn't retreat. I couldn't do anything.

Q. What happened after the altercation between you and Calvin?

A. Everybody started moving, you know. And I'm frightened; I'm scared myself. And this girl say, "You want—you want your marijuana?" And I said, "Yes, give me my half." And she gave me my half and we left.

Q. Did you threaten that girl at any time?

A. No, sir, I did not.

Q. Did you say you were going to kill her?

A. No, sir, I did not.

Q. She's testified, and you heard her testify here in open court that you said you were going to kill her; is that testimony correct?

A. That testimony is false.

Q. Then the three of you left Calvin's apartment?

A. That is correct.

Q. What did you do with the knife?

A. When I was leaving out of Calvin's apartment, everybody started running. So did I. I was scared. I wanted to catch up with somebody so I could talk to somebody about what happened. I didn't know if I hurt Calvin or what. I said—one thing that came to my mind, "Throw that knife (p. 305) away." So I threw that knife away. Where I threw the knife, I don't know.

Q. But you threw it?

A. I threw the knife away.

Q. Charley, why did you go back to Calvin's the second time?

A. The reason why I went back to Calvin the second time, I was down there at the tavern, at 420, and my friend, he say, "Well, I know Calvin better than you do. I've been—known him for quite some time." He's been in Cedar Rapids very much longer than I have. He say,

"I probably can talk to him. He don't understand you. I can talk to him. Come on. Let's go back. I can get it back for you." I said, "Okay." So he kept insisting, insisting, so this is what happened. He wanted me to go back with him, and I went back with him.

Q. Did you have any intention of stabbing Calvin when you went back?

A. I had no intention of doing any harm to Calvin.

Q. Did you have any intention of robbing him of anything?

A. No, sir, I didn't.

Q. In fact, the marijuana we're talking about, you thought at least was half yours, didn't you?

A. That's right.

Q. Well, taking all you've said into account, why did you hurt him?

A. I didn't know I hurt him. And the reason I hurt him, because (p. 306) I was in danger and the people that came there to the apartment with me was in danger. I didn't know if Calvin was going to go up—beserk (sic), bananas, shoot everybody in there or what, and I couldn't retreat. I couldn't move back. The only thing I know—the thing happened so fast, so spontaneous, I didn't know what happened really. It just happened.

MR. ROBINSON: I have no further questions, Your Honor.

THE COURT: You may cross-examine.

Cross-Examination

BY MR. DENTON:

Q. Now, Mr. Whiteside, you didn't know how badly you had hurt Calvin?

A. No, sir, I didn't.

Q. What did Calvin do after you hurt him?

A. I think Calvin, he laid back on the bed, and he kind of balled up, and Derrick was telling me about the reefer, that's when I kind of looked like this. Just, you know, made me go, you know, bananas. I didn't know what's going on now.

Q. Did you have any idea how badly hurt Calvin was?

A. No, sir, I didn't.

Q. About how long was the blade on your knife?

A. My statement may not be correct, but I can give you a very intelligent guess. I'd say approximately about six and a half to seven inches.

(p. 307) Q. Did you know where you stabbed Calvin?

A. No, sir, I didn't.

Q. Did you have any idea where you stabbed him?

A. No, sir, I didn't.

Q. You just knew you had stabbed him?

A. I just knew I had cut Calvin, yes.

* * *

(p. 312) Q. Now you knew when Calvin started to hit you, he didn't have anything in his hands, didn't you?

A. I couldn't tell if Calvin had anything in his hand or not. The thought that came to my mind was to protect myself. And when he got up and came at me like this, I didn't have no other choice but to think of protecting myself.

• • •

(p. 314) Q. Isn't it true that if you—you knew when you stabbed Calvin he didn't have his gun at that time?

A. No, I didn't.

Q. After you stabbed him when he fell back on the bed, did you see a gun?

A. No, sir, I didn't.

Q. And in fact you never saw Calvin with a gun or any other (p. 315) weapon?

A. Are you speaking pertaining to this at that time?

Q. At that time.

A. No, I didn't see a weapon or anything. All I knew that Calvin made a threat and told his girl to give him his shit, and he reached in a manner to get something from underneath the pillow, and he encountered me, and this is all I know that happened.

• • •

Supplemental Motion for a New Trial

State v. Whiteside (Iowa Dist. Ct., Linn Cty., CRF # 3199-0277)

EXHIBIT A

(handwritten statement)

She didn't move, I turn back to Calvin, which he was pulling a pistol from underneath the pillow and bed, which he was laying on, at this time I reacted, I stabbed him I thought in shoulder, he still reaching, I stabbed him again. Calvin girl friend yelled and ask me, do I want the reefer I said yea! give me my half. I assume that was my half, we left walking (after I through the knive) I went to my brother house Albert Whiteside 512 5th St. S.E. told him I think I might have kill some body I wanted some counceling & aid from of what to do, he got scared and told he to get the fuck out and throw the knive away. We went across the lawn next door to Terry Fowler house to smoke some reefer and talk about what happen. Derick Doolin convince me nothing was wrong and nothing was going to happen, lets go home. So Dereck and I went to our apartment. After that police came and got . . . (end of page 1)

/s/ Charles Whiteside

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

CRF No. 3199-0277

STATE OF IOWA,

Plaintiff,

vs.

EMANUEL CHARLES R. WHITESIDE,

Defendant.

RULING ON SUPPLEMENTAL MOTION FOR RULING ON SUPPLEMENTAL MOTION FOR NEW TRIAL AND ORDER SETTING SENTENCING

Defendant's Supplemental Motion for New Trial was heard by the undersigned Judge on July 29, 1977. Defendant was personally present with his recently appointed counsel, Emmit J. George. The State was represented by Assistant Linn County Attorneys Harold L. Denton and Glenn Johnson. Evidence was received. On August 11, 1977, written Briefs of counsel were filed.

The Supplemental Motion for New Trial consists of paragraphs 7 and 8, paragraphs 1 through 6 having constituted the original Motion for New Trial, which has been overruled.

PARAGRAPH 7

Paragraph 7 of the Supplemental Motion for New Trial alleges that defendant did not receive a fair and impartial trial on the grounds that his former attorneys, Ms. Paulsen and Mr. Robinson, caused him to materially alter his testimony at the trial by coercion, undue influence, and other improper means.

In respect to paragraph 7, testimony given by defendant and testimony given by Ms. Paulsen and Mr. Robinson conflicted in certain respects. I find the facts to be as testified to by Ms. Paulsen and Mr. Robinson.

Defendant has failed to prove the grounds he alleges in paragraph 7 of his Supplemental Motion for New Trial.

PARAGRAPH 8

Paragraph 8 of the Supplemental Motion for New Trial alleges that newly discovered evidence has been made available since the trial inasmuch as the defendant has recanted his trial testimony on material matters.

Indeed, defendant has recanted his trial testimony that he did not actually see a weapon in the victim's hand.

Recantation by a trial witness of the testimony he gave at trial may require the granting of a new trial. 58 Am.Jur.2d, New Trial, Sec. 175, pp. 390-392. See *State v. Compiano,* 261 Iowa 509, 154 N.W.2d 845; *State v. Thompson,* 241 Iowa 16, 39 N.W.2d 637. However, recantation of trial testimony cannot constitute grounds for the grant of a new trial when the person recanting his testimony is the defendant himself.

Defendant has failed to prove the grounds he alleges in paragraph 8 of his Supplemental Motion for New Trial.

RULING

Defendant's Supplemental Motion for New Trial is overruled.

ORDER

IT IS ORDERED that defendant appear in a courtroom of the Linn County Courthouse at Cedar Rapids, Iowa, with his counsel at 2:00 p.m. on August 26, 1977, for imposition of sentence.

Dated this 16th day of August, 1977.

/s/ Harold D. Vietor
Judge, Sixth Judicial District